WILLIAMS ERNEST BALASINGAM *a*

v.

THE BAR COUNCIL

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
HARUN HASHIM J
ZAKARIA YATIM J
[ORIGINATING MOTION NO. A 33 OF 1984]
12 APRIL 1985 *b*

LEGAL PROFESSION: *Appellant convicted under ss. 109 and 409 of Penal Code - Inquiry held before Disciplinary Committee - Order that appellant be struck off the roll of advocates and solicitors - Whether justified.* *c*

The appellant, a practising advocate and solicitor, was convicted in the Sessions Court under ss. 109 and 409 of the Penal Code with abetting the commission of an offence of criminal breach of trust. His appeal to the High Court was dismissed.

A formal inquiry was held before the Disciplinary Committee ("the Committee") under s. 100 of the Legal Profession Act 1976 ("the Act"). The appellant was struck off the roll of advocates and solicitors. The appellant now appeals on the following grounds: *d*

(i) he was unaware that at the hearing before the Committee he was entitled to be represented by Counsel;

(ii) the Committee acted on the assumption that he came within s. 93(2)(a) of the Act because he had been convicted of a criminal offence; *e*

(iii) the Committee did not consider whether the appellant committed the offence in his capacity of advocate and solicitor,

(iv) the Committee did not consider that he had not committed any offence involving misuse of the moneys of his clients or of dishonesty towards a client or in respect of any property belonging to a client; *f*

(v) the Committee had no ground to conclude that he instigated, conspired with and aided one Mahendran s/o Arasanandam to commit criminal breach of trust because the Committee was not in possession of the record of the case in which he was convicted;

(vi) the Committee failed to consider the mitigating circumstances. *g*

Held:

[1] As an advocate and solicitor, the appellant ought to have known his right of representation by Counsel. Rule 10 of the Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 clearly provides that either side shall have the right to be represented by a Counsel of his choice. *h*

[2] It was not open to the Committee to go behind the conviction to ascertain whether the conviction was justified. The conviction was final in that the appeal against the conviction was dismissed and therefore it was a conviction within the contemplation of s. 93(2) of the Act.

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[3] The present provisions of s. 100(1) of the Act (as amended by Act A567) are inconsistent with s. 93(2)(a). Section 93(2)(a) should be read subject to s. 100(1) so that the words "a criminal offence as makes him unfit to be a member of his profession" appearing in s. 93(2)(a) should be read and understood to mean a criminal offence committed in his professional capacity. In the present case, the Committee did not make a specific finding whether the appellant committed abetment of criminal breach of trust in his professional capacity. The appeal record of the Sessions Court was not placed before the Committee and therefore the Committee did not have the opportunity to consider the full facts of the case.

[4] The Committee has a very wide discretion to make any order as it thinks fair and reasonable under s. 101(1) of the Act. In considering the question of mitigation, aiding should be taken as less serious than instigation and should attract a less severe sentence. It was not proper for the Committee to arrive at a finding of instigation, conspiracy and aiding without the proper record of evidence before it.

[Decision and order of Committee set aside. Case to be sent back to Committee for fresh inquiry.]

Legislation referred to:
Legal Profession Act 1976, ss. 93(2), 93(2)(a), 100(1), 101(1)
Penal Code, ss. 109, 409
Advocates and Solicitors (Enquiry) Procedure Rules 1970, r. 10

For the appellant - Navarednam; *M/s. Sulaiman C. Navarednam & Co.*
For the respondent - Ong; *M/s. Mah - Kok & Din*

JUDGMENT

Wan Hamzah J:

Williams Ernest Balasingam, a practising advocate and solicitor, was convicted in the Ipoh Sessions Court under S. 109 and 409 of the Penal Code with abetting the commission of an offence of criminal breach of trust by one Mahendran s/o Arasanandam in respect of a sum of RM29,500 and was sentenced to six months' imprisonment and a fine of RM20,000. He appealed to the High Court and his appeal was dismissed.

After an initial inquiry was held under the Legal Profession Act a Disciplinary Committee was appointed by the Chief Justice to hold a formal inquiry under s. 100 of the Act into the information touching upon the conduct of Mr. Balasingam. In his statutory declaration verifying the truth of the allegations in the Statement of Complaint the Secretary of the Bar Council stated that the documents which the Bar Council may rely on at the inquiry before the Disciplinary Committee were the appeal record of the Sessions Court case. After holding the formal inquiry the Disciplinary Committee made an order that Mr. Balasingam be struck off the roll of advocates and solicitors. He is now appealing against that order.

There are six grounds stated in Mr. Balasingam's Notice of Originating Motion. We shall deal first with ground No. 6 which reads-

> The appellant was unaware that at the hearing before the Disciplinary Committee he was entitled to be represented by Counsel, as, in his interpretation of s. 100(2)(a) of the Legal Profession Act 1976, it is only the Bar Council and the complainant who are permitted representations by Counsel.

As an advocate and solicitor Mr. Balasingam ought to have known his right of representation by Counsel. Rule 10 of the Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 clearly provides that either side shall have the right to be represented by a Counsel of

his choice. It is not that he was denied of his right. Moreover, Mr. Navarednam acting as Counsel for Mr. Balasingam at the hearing of this appeal argued the case fully, as good as if he was arguing before the Disciplinary Committee. Therefore in our judgment this ground should be dismissed.

Next, we shall deal with ground of appeal No. 1, which reads-

> The Disciplinary Committee misdirected itself on its functions by acting on the assumption that, because the appellant had been convicted of a criminal offence, he came within the ambit of the provisions of s. 93(2)(a) of the Legal Profession Act, 1976.

The following are the provisions of the Act referred to:

> Due cause may be shown by proof that the advocate and solicitor in Malaysia or elsewhere-
>
> (a) has been convicted of a criminal offence as makes him unfit to be a member of his profession.

In our judgment it was not open to the Disciplinary Committee to go behind the conviction to ascertain whether the conviction was justified. The conviction was final in that the appeal against the conviction was dismissed, and therefore it was a conviction within the contemplation of s. 93(2).

We shall consider grounds No. 3 and 4 together. They are stated as follows:

> 3. The Disciplinary Committee failed to fully appreciate the fact that the conviction of the appellant did not touch upon the conduct of the appellant as an advocate and solicitor.
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> 4. The Disciplinary Committee failed to consider or to consider adequately the fact that the appellant had not committed any offence involving misuse of the moneys of his clients or of any of them, or of dishonesty towards a client, or in respect of any property belonging to a client.

Section 100(1) of the Legal Profession Act provides as follows:

> It shall be the function of the Disciplinary Committee to conduct a formal inquiry into the complaint or information touching upon the **conduct of an advocate and solicitor in his professional capacity** with respect to which the Committee has been appointed.

We underline the words "the conduct of an advocate and solicitor in his professional capacity" in order to emaphasise the point that it is not every kind of misconduct of advocate the solicitor which the Disciplinary Committee should be concerned with but only misconduct committed in his professional capacity. The present provisions of s. 100(1) have been added by Act A567 and have come into force since 16 December 1983. In our opinion they are inconsistent with the provisions of s. 93(2)(a) in that under s. 93(2)(a) due cause may be shown by proof that an advocate and solicitor has been convicted of any criminal offence as makes him unfit to be a member of his profession, whereas under s. 100(1) the function of the Disciplinary Committee to conduct a formal inquiry is confined to an inquiry into the conduct of an advocate and solicitor in his professional capacity only and does not extend to an inquiry into a conviction of an offence which was committed otherwise than in professional capacity. Since the present provisions of s. 100(1) have been introduced by way of amendment to the Act, in our opinion s. 93(2)(a) should be read subject to s. 100(1), so that the words "a criminal offence as makes him unfit to be a member of his profession" appearing in s. 93(2)(a) should be read and understood to mean a criminal offence committed in his professional capacity.

In the present case the Disciplinary Committee in its Order did not make a specific finding whether Mr. Balasingam had committed the abetment of criminal breach of trust in his professional capacity. It appears that at the time of the inquiry by the Committee the appeal record of the Sessions Court was not placed before the Committee and therefore the Committee did not have the opportunity and facility to consider the full facts of the case to enable it to ascertain whether the offence was committed by Mr. Balasingam in his professional capacity. In its Order the Committee stated the following finding of fact:

> The respondent had at no time used clients' monies in advancing the sum of RM23,000 to Mahendran s/o Arasanandam nor was the clients' account of the respondent's firm at any time been short of funds as certain clients' monies were placed in fixed deposit, which is permitted by the Solicitors Accounts Rules.

It may be argued that this finding is tantamount to a finding that the offence was not committed by Mr. Balasingam in his professional capacity, and we understand that it was contended so by his Counsel. But this stated fact may not be the only fact to be considered to ascertain whether the offence was committed by Mr. Balasingam in his professional capacity. There may be some other facts which have to be taken into consideration. The appeal record which consists of the notes of evidence and the judgment of the President of the Sessions Court should be read in order to get the facts of the case. The judgment of the High Court in the criminal appeal should also be read. Since the appeal record was not before the Committee, it was of course not produced to the High Court in the present appeal. It is not clear from where the Committee obtained the fact which they stated as above. For the reason that the Committee made the enquiry without the appeal record before it, in our judgment its decision and order should be set aside and this case should be sent back to the Committee to hold a fresh inquiry and the Sessions Court appeal record and the High Court judgment should be made available to the Committee for the purpose of the fresh inquiry. We order accordingly.

For the purpose of completeness we would like to consider also the remaining grounds of appeal, i.e. grounds No. 2 and 5, which are in the following terms:

> 2. The Disciplinary Committee had no grounds for arriving at the simple conclusion that the appellant instigated, conspired with and aided one Mahendran son of Arasanandam to commit criminal breach of trust because the Disciplinary Committee was apparently not in possession of the records of the case in which the appellant was convicted.
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> 5. The Disciplinary Committee, in handing down its decision, failed to consider the mitigating circumstances pertaining to the appellant.

We believe that ground No. 2 is relevant to the question of mitigation and therefore we would like to consider it together with ground No. 5. On the question of mitigation, in our opinion it is relevant to refer to the following provisions of s. 101(1):

> A Disciplinary Committee may make such order as it thinks fair and reasonable, including -
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> (a) striking off the Roll the name of the advocate and solicitor against whom the complaint was made or information referred;
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> (b) suspending from practice the advocate and solicitor;
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> (c) imposing on the advocate and solicitor a penalty not exceeding five thousand ringgit payable to the Compensation Fund;
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> (d) censuring the advocate and solicitor;
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> (e) awarding costs to or against any party.

So the Disciplinary Committee has a very wide discretion to make any order as it thinks fair and reasonable. It has to ascertain whether there are mitigating circumstances which justify any one of the more lenient treatments. Abetting the commission of an offence consists of-

(a) instigating another person to commit the offence, or

(b) engaging with another person in a conspiracy for the commission of that offence, or

(c) intentionally aiding the commission of that offence.

In considering the question of mitigation, aiding should be taken as less serious than instigation and should attract a less severe sentence. In the present case the Disciplinary Committee made a finding that Mr. Balasingam was guilty not only of aiding but also of instigating and conspiring. This seems to be one of the reasons, why the Committee took a serious view and imposed the more severe punishment of striking off the roll. The question is whether it was proper and correct for the Committee to arrive at a finding of instigation, conspiracy and aiding without the proper record of evidence before it. In our opinion it was not.

Also found at [1985] 2 CLJ 173